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Commentaries on the Public Acts of Indiana (Part 1)

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COMMENTARIES ON THE PUBLIC ACTS OF INDIANA, 1927

I. THE UNIFORM DECLARATORY JUDGMENTS ACT

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To the public and general practitioner, perhaps no act of the Indiana legislature is so important, since the adoption of the code in 1852, as Chapter 81 of the Acts of 1927, being the Uniform Declaratory Judgments Act. Indiana is not blazing a new trail by its adoption.

In making a survey of this weighty subject let us blink no difficulties and bear in mind that a discussion of a subject of this magnitude raises a veritable host of comments and queries.

It has been regarded as a universal forensic axiom, under Anglo-Saxon jurisprudence, that courts are created to redress private wrongs and punish the commission of crimes and misdemeanors, and do not sit in an advisory capacity to inform the people of their particular rights before injury inflicted. This constricted sphere of juridical influence is rather peculiar to the English common law. In other civilized nations, with few exceptions, under other codes of law, relief has been divided into two recognized categories, (a) Definitive or declaratory; (b) Remedial or corrective. Generally speaking, whatever of relief was heretofore grantable in courts ministering justice under the Anglo-Saxon forms of law, bearing any resemblance to declaratory judgments, was confined to instructing designated public officials, the legislature, or officers of the court, in their duties in regard to questions which, from time to time, arose in the administration of their respective offices. The available remedy of securing the construction of wills, is usually justified on this

* See biographical note, p. 379.

theory. The custodial right of an interpleadant, where the ownership of property is in dispute, partakes of this characteristic, on the theory that the interpleadant is a trustee.

The fiction of the law, that everyone is conclusively presumed to know the law, and, therefore, governs himself accordingly, not only as to the validity and interpretation of acts of the legislative branch of government, but likewise as to the construction of contracts, etc., lays at the foundation of the refusal of courts generally to make themselves vehicles of definitive or declaratory relief. This restriction on the exercise of judicial functions should have more valid reason for existence than the one so generally posited, and if none other can be advanced, the constriction should cease. To hold that a man must violate the law in order to ascertain its validity or construction, is a barbaric requirement, to say the least. To hold that one must breach a contract before determining its legal effect—before securing a judicial pronouncement upon its obscure terms—is not in harmony with any true concept of justice. To rectify this anamolous situation, declaratory judgments are now legalized. As ably stated by Professor Borchard, who made an extensive study of the English and continental statutes and decisions on the subject, in his article on "Declaratory Judgments":[1]

> "The purpose is to afford security and relief against uncertainty and doubt. It does not necessarily pre-suppose culpable conduct on the part of the defendant, but it enables any party, whose rights, privileges, powers, or immunities—whether evidenced by written instrument or not—have been disputed, in danger thrust, or placed in uncertainty, by another person, to invoke the aid of a court to obtain an authority, determination or declaration of his rights or other legal relations."

We do not here wish to undertake a review or repetition of all that has been said in extensive treatises on the subject, but refer the reader to them. Besides Professor Edward M. Borchard's elucidation on the law, its origin, purpose, functions and appropriate field, we refer the reader to an equally profitable discussion by Professor Edson R. Sunderland;[2] also articles appearing in the Harvard Law Review[3] and Virginia Law Review,[4] as well as the article in The Journal of the American Bar Association.[5]

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[1] 28 Yale Law Journal 1-125.
[2] 16 Mich. Law Rev. 69.
[3] 34 Harvard Law Rev. 697.
[4] 9 Vir. Law Rev. 167.
[5] A. B. A. Rept., 1921, pp. 393-95.

It has been frequently urged against the adoption of this act now in effect in twenty states (New York,[5a] Tennessee,[6] Virginia,[7] Pennsylvania,[8] Indiana,[9] South Carolina,[10] Michigan,[11] South Dakota,[12] Connecticut,[13] New Jersey,[14] Rhode Island,[15] Wyoming,[16] California,[17] Florida,[18] Utah,[19] Hawaii,[20a] Kansas,[20] Kentucky,[21] Wisconsin,[22] and North Dakota,[23]) that it will overwhelm the courts with cases presenting but moot questions of law and fact. Granted that more cases will be filed, is it unreasonable to suggest that most of the cases filed solely by virtue of the enlargement of the functions of the court in this direction, would have gone to regular litigation and taken up more time and have been more costly were this relief unavailable? The experience in the English courts, which have, in effect, rendered declaratory judgments for a number of years, has not been such as to indicate a great resultant growth in actually litigated cases. Insofar as it is urged that moot questions will be pressed for consideration, such cannot constitute a proper objection under Section 6 of our act which provides:

"The court may refuse to enter or render a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings."

It is quite as necessary as before that substantial rights of the parties before the court be involved to invoke judicial aid under the act of 1927.

[5a] Civil Prac. Act. 473, Rules C. Pro. ced. 212.
[6] Acts Tenn. 1923, p. 101, Uniform Act.
[7] Acts Vir. 1922, Chap. 517.
[8] P. L. 840, Pa. St. Sup. 1924, Sec. 12805 al to 12805a16.
[9] Acts Ind. 1927, p. 207.
[10] Acts S. C. 1922—967.
[11] Mich. Act 150 of 1919.
[12] Acts 1925, S. D., p. 230.
[13] 2 Gen. Stat. (1918) Sec. 5113.
[14] 1924 P. L. 312.
[15] Gen. Laws 1923, Sec. 4952-4953.
[16] 1923 Wyo., Chap 50 Uniform Act.
[17] Code Civ. Proceed. 1923, Sec. 2060.
[18] 1919 Fla., p. 148.
[19] Laws 1925, p. 40.
[20a] Hawaii P. L. 1920.
[20] 1921 Kan., Chap. 168.
[21] Ky. 1922, p. 235.
[22] Laws 1919, p. 253, Chap. 237.
[23] Laws 1923, Chap. 237.

HISTORY AND CONSTITUTIONALITY

As heretofore intimated, the invocation of jural declaration of rights, so far as other civilized nations are concerned, is nothing novel. It had its beginnings in antiquity. The procedure originated in classical Roman law. It was later adopted by, and is still extensively used, in many European and Spanish-American countries. Scotland has fully enjoyed this practice for more than four centuries. From Scotland it was imported into England. The first act of Parliament giving sanction, in a restrictive way, to be sure, to declaratory judgments, was put in force in 1852,[24] the same year as Indiana adopted its first civil code. When inaugurated by the English courts, a restricted interpretation was given to this act. It was held that, while the grant of consequential relief was not a *sine qua non* to jurisdiction, nevertheless, upon the face of the pleading, it must appear that the petitioner or the contradicter would be entitled to consequential relief. When Parliament granted to the Queen's Bench the powers of issuing general orders affecting practice in her Majesty's court of legal and equitable jurisdiction by one of the early orders issued,[25] this restrictive interpretation was obviated by providing that a declaratory judgment or order may be entered notwithstanding the pleadings did not claim, nor would it have been thereunder proper to grant, consequential relief. The first legislation on the subject in the United States, so far as we can determine, was the New Jersey statute of 1915.[26] This was extremely limited in its scope of application to wills, granting a right to the construction of a will even though a present controversy concerning its construction was not apparent from the pleading.

This statute was construed by the New Jersey chancellor[27] to extend the ordinary equitable procedure to the construction of a will, that is that it was not merely declaratory of the law as it existed at the time of the passage of the statute, but meant to embrace and extend the scope of construction even though no present controversy existed. The court upheld the constitutionality statute in that cause and entered a declaratory judgment.

Numerous decisions of the American courts reveal intention and willingness to break through the fetters and restraints of the common law, and a disregard of the legal fiction, noted above,

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[24] Victoria, Chap. 86.

[25] 1883 Order 25 R. S.

[26] General statutes 1915, Sec. 1556.

[27] Ungaro 88 N. Y. Equity 25, 102 At. 244.

to grant relief of a declaratory nature, even in the absence of an enabling statute. It has been an interesting phenomenon of our judiciary fumbling with correct keys at the door of efficient administration of law, insistent the while that the door cannot open without the skeleton key of legislation or the master key of constitutional amendment.[28]

Prior to the enactment of the New Jersey Statutes of 1915, the states of Rhode Island, and Connecticut (1876 and 1883, respectively) had in force statutes which, to a considerable degree, relaxed the common law concerning the claimed essential of consequential relief being available by the suit, but these statutes did not carry the right to relief to the point of constituting a recognition of declaratory judgments as we know them today. The first act broadly embracing declaratory judgments, as provided for by the Uniform Declaratory Judgments Act, is the state of Florida, which in 1919 enacted a declaratory judgment act[29] followed close at heel by the state of Wisconsin,[30] the latter, however, having been repealed in 1923. Michigan followed with the enactment of declaratory judgments act of 1919.[31]

So far as our research has gone, this last mentioned act was the first one up for decision on the test of its constitutionality. It came before the Michigan Supreme Court for consideration in 1920.[32] The plaintiff sought to secure a construction of the statute with reference to the number of days which he would be permitted to labor in any consecutive seven days. It had all the ear-marks of a friendly suit between the employer and employee railroad company for the purpose of determining whether or not the railway company would violate the law by permitting its employees to work for more than six days in any consecutive seven days, and the Supreme Court, through Justice Fellows, held that its decision would be controlled and was controlled by cases from the United States Supreme Court.[33] The Muskrat and Gordon cases seemed to be the two principally relied upon

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[28] Slingerland, 109 Minn. 407; 125 N. W. 19; *Porten v. Peterson,* 139 Minn. 152; 156 N. W. 183; In re Ungaro, 88 N. Y. Equity 25; 102 At. 244.

[29] Laws 1919, p. 148.

[30] Laws 1919, page 253.

[31] Act 150, Public Acts 1919.

[32] *Charles Anway v. Grand Rapids Railway Co., et al.* (decided Sept. 30, 1920), 211 Mich. 592; 179 N. W. 350; 12 A. L. R. 56.

[33] *United States v. Ferreira,* 13 Howard 40, 14 L. E. 42; *Trega v. Modesto Irrigation District,* 164 U. S. 179, 41 L. E. 395, 17 Sup. Ct. R. 52; *Muskrat v. U. S.,* 219 U. S. 346, 55 L. Ed. 246, 31 Sup. Ct. Rep. 250, and in *Gordon v. U. S.* 2 Wall, 561, 17 L. E. 1921.

for refusing jurisdiction, on the ground that the duty of the court under the Constitution is limited to actual pending controversies and it can not pronounce judgment on abstract questions if its opinion must influence future action under like circumstances, and, therefore, the statute in question was declared unconstitutional because it requires the court to render advisory opinions upon moot questions. Professor Sunderland of the University of Michigan was the author of the act and filed a brief as *amicus curae*. The decision was by a divided court.

Following this decision through vigorous efforts of the American and numerous State Bar Associations, California, Connecticut, Pennsylvania, Kentucky, Michigan, New Jersey, New York, Rhode Island, and Virginia enacted the declaratory judgments act. The constitutionality of the Kansas act was the next one tested. It was upheld by the Supreme Court of Kansas,[34]. Thereupon followed decisions in Virginia,[35] California,[36] New York,[36a] Connecticut,[37] New Jersey,[38] Pennsylvania[39] and Tennessee,[40] all sustaining the act as within the power of the legislature.

While the state of Kentucky has not directly passed upon the constitutionality of its act it has been called upon in several instances[41] to pass upon the scope and purport of the act with every indication that if the question were squarely presented, it would hold the act constitutional.

The usual contention urged against the constitutionality of legislation authorizing declaratory judgments, has been that in order to obtain a declaration of status or right, it was not required that an actual wrong should have been done, such as would give rise to an action for damages, nor need any be immediately threatened, such as would warrant the issuance of an injunction, and, therefore, no problem for the intervention of judicial functions is present. Strictly speaking, a "cause of action," as the term is generally understood, is not a prerequisite to the assump-

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34 *State of Kansas ex rel. Richard J. Hopkins v. Charles E. Groves*, 109 Kans. 619, 201 Pac. 82.

35 *Patterson, executor, et al. v. Patterson*, 131 S. E. 217.

36 *Blakeslee v. Wilson*, 190 Calif. 479, 213 Pac. 495.

36a *Board of Education of City of Rochester v. Van Zandt*, 195 N. Y. S. 297.

37 *Bramen v. Babcock*, 98 Conn. 549, 120 At. 150.

38 Act of 1924, *McCrory Stores Corp. v. Brownstein Inc.*, 134 At. 752.

39 In re: Petition of Karaher, 131 At. 365.

40 *Miller v. Miller*, 129 Tenn. 463, 261 S. W. 965.

41 *Revis v. Daugherty*, 287 S. W. 28; *Axton v. Goodman*, 205 Ky. 382, 265 S. W. 806; *Ezzell v. Exall*, 207 Ky. 615, 269 S. W. 752.

tion of jurisdiction of a proceeding looking to a declaration of rights.

Is not this contention unsound? Is it not true that every decision—mesne or final—in a court of justice constitutes a declaration of rights? No pecuniary, mandatory, injunctive, or other remedial relief could be obtained unless there first be a declaration or ascertainment of the respective rights of the parties. The ancient action of *qui timet* lay before any damage was inflicted or even imminent danger thereof. A judgment in *qui timet* possesses many of the features peculiar to a declaratory judgment. The analogy, so far as the essentials of jurisdiction are concerned, must be obvious to all. The action to quiet title or the equitable action to remove a cloud by cancellation of instruments, also bear analogy. The declaration of status as to marriage, by annulment thereof, does nothing more than establish status, or, rather, re-establish it; and in many cases of ejectment, where there is no actual damage, the suit is brought and litigated merely for the purpose of securing a declaration of rights of the parties, the common law requisite of right to possession by the plaintiff in ejectment being abandoned under most statutes; similarly, actual possession or right thereto in quiet title proceedings. When we brush away the fictions of the law, and the absurd expedients resorted to in order to satisfy them, we find that courts have entertained proceedings partaking of this character for many years. The rendition of a declaratory judgment (by another name) has never aroused any surprise or question of jurisdiction so long as ancient forms and conventions of procedure were followed—whether substantially fictitious or patently fictitious.

When a close study of the declaratory judgment acts is made the statement of the Michigan Supreme Court in the Anway case that naught but moot cases may be presented under the act, does not commend itself.

A moot case is imaginary. It does not exist in fact; to decide it serves no useful purpose—nothing is adjudicated, so nothing is affected. Whereas a declaratory judgment must always deal with a real dispute of a real fact. An advisory opinion is merely a giving of advice, it is not binding.

Great stress was laid in the Anway case on the language of Chief Justice Taney in the case of *Gordon v. United States*, wherein it was said (117 U. S. 702):

"The award of execution is a part, and essential part, of every judgment passed by a court exercising judicial power; there is no judgment, in the legal sense of the term, without it."

The language was entirely too broad to serve as a universal criterion as to when a decretal pronouncement is a judgment, and when it is not a judgment. It did fit that particular case, because whatever the court determined therein was not finality, it still being up to the secretary or treasurer to approve or disapprove an award, regardless of what the Supreme Court of the United States may have done with it. Countless instances may be cited where a judgment is a judgment notwithstanding execution cannot thereon issue or is in no wise called for, except possibly for costs. Whenever a court decides for the defendant in a case, in the absence of a cross complaint, counterclaim or set-off, a judgment is rendered. No execution can issue thereon, but the rights of the parties within the issues made are thoroughly adjudicated. In many cases where the plaintiff prevails, a judgment or decree is entered, but no execution issued unless there be disobedience of the judgment, to-wit: Decrees or judgments in quiet title; decree of divorce without alimony; judgment of *qui timet* without damages; replevin without damages where the plaintiff has, under bond, recaptioned the property prior to trial; permanent injunction; judgment of adoption; judgment of admitting a will to probate; judgment declaring a will void; judgment establishing boundary lines; judgments establishing heirship; judgments of adoption; judgments establishing drains and irrigation canals; judgments under eminent domain; judgments establishing line fences; judgments in escheat; judgments appointing guardians; judgments in habeas corpus; judgments establishing highways, and their improvement; judgments in interpleader; judgments re-establishing lost instruments; judgments changing names; judgments of ne exeat; judgments in prohibition; judgments in quo warranto; decrees reforming instruments; allowance of registration of land titles; establishing schools in school districts; decrees in specific performance, and numerous other proceedings which will occur to every lawyer. It is true, that in some of these proceedings relief by way of execution may be had if the judgment is resisted, and so under the declaratory judgment act, specific provision being made for subsequent relief in event need arise therefor. In actual practice in few of the enumerated classes has it heretofore become necessary to issue any *execution.* The judgment speaks and acts for itself—

determines the status: establishes the rights of the parties as between each other. The majority of the Michigan Supreme Court lost sight of the fact that after the decision in the Gordon case, the veto power of the secretary of treasury over awards by the court of claims, was removed, and the United States Supreme Court thereafter entertained jurisdiction of appeals from it, although there was no method provided for an execution against the government. It was thus, in effect, held that the pronouncement of Chief Justice Taney, as regards necessity of execution, was entirely too broad to be accepted as a universal role. He went too far when he said that every judgment, to be accounted such, must be susceptible of having execution issue thereon. We must conclude that in the Gordon case, what was really decided was that the decision must needs lack finality, therefore could not definitely fix and establish a status, and as it consequently would be in the nature of an advisory opinion only, the court could not, under the Constitution, entertain jurisdiction.

The Muskrat case grew out of an act of Congress authorizing a plaintiff to bring an action in the court of claims to test the constitutionality of a federal statute relating to Indians. It was provided that an appeal might be taken to the Federal Supreme Court. The government, which was made defendant, had no interest adverse to the plaintiff, and the Indians affected were not parties, therefore, there was no real controversy to be adjudicated, and the Supreme Court refused to consider the appeal.

Looking to the underlying principle in the Muskrat case as expounded by Mr. Justice Day (31 Supreme Court 256) it amounted merely to saying that whatever the court might in that case decide on the proposition, would not settle it. It would still, like Banquo's ghost, refuse to be put down, and when a controversy arose between *parties actually interested,* the court could not point with finality to its previous decision—that it would, like other obiter dicta, not be considered *stare decisis.*

With regard to a possible constitutional point that there is denial of trial by jury: Our act does not provide for trial by jury, but, under the Connecticut Act the Supreme Court of that state ruled that there should be a trial by jury of any fact in appropriate cases, and so upheld the constitutionality of the statute, although it contained no specific provision for such trial of issues of fact.[42]

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[42] *DeMiles v. Strong,* 68 Conn. 273, 36 At. 55; *Leighton v. Baily,* 77 Conn. 22, 58 At. 355; *Dawson v. Town of Orange,* 78 Conn. 96, 61 At. 101.

The power of the legislature to change methods of procedure and create new forms of action and to remove restrictions against invoking court action, has even been admitted. For example, a statute providing for the quieting of title under circumstances which, under the rules of common law and established chancery practice, would have been insufficient for laying the foundation of such a suit, is constitutional.[43]

Legislatures recognize that law is a progressive science, and forms of procedure which at one time were regarded as ESSENTIAL, may no longer be necessary because of altered conditions, although by all jurisconsults recognized as indispensable at the time of the adoption of the Constitution. But that fact—the fact of novelty—alone constitutes no valid objection against the Act.[44]

All that must be maintained, at all times, is the fundamental elements of due process. Civilization cannot pause to give ceremonial burial to the dead slough of its feudal age. Progress is a continual readjustment. When we of the legal profession come to a full and practical realization of that truth we will go a long way to put at rest the acrimonious criticism that the law, as the Chinaman, is two centuries behind the times. Nor is it a valid sign of progress to rest too heavily on tradition. If the laity, as the law, were slave to tradition, we would still be riding stage-coaches by day, reading poor print by candlelight at night, and Ben Franklin's Almanac would still be our calendar. For a century and a quarter tradition forbade many things, we have today. Travel by air, transmission of voices by wireless, and piercing of the seas in submarines violated tradition.

APPLICATION OF LAW, AND QUESTIONS THAT MAY ARISE THEREUNDER

The first question under our statute suggests what courts have the power to enter declaratory judgments. The statute says that

> "*Courts of record* within their respective jurisdictions shall have power to declare rights, status, and other legal relations," etc.

We do not believe that it was the intention of the legislature to confer these powers upon courts other than courts of superior jurisdiction, to-wit: Circuit, superior, and probate courts of

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[43] *Politan v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 496, 28 L. Ed. 52.

[44] *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. E. 232; *Twinniny v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. E. 97.

the state. The statute demonstrates the necessity of carefully scrutinizing so-called "uniform acts" before adopting them in the various states, because some word or phrase therein contained might conflict with established law or render the act itself or its application in a fashion never intended, and at times virtually ridiculous, because of local usage of the term employed. In Indiana it has been well established that justice courts are *courts of record.*[45]

That is not the view generally prevailing in other states. The term "Courts of record" in most other states is confined to designate courts of general jurisdiction. The test of a court of record has been held to be the right to fine and imprison for contempt of court. The fact that a permanent record was kept of the proceedings is not usually holden to constitute such courts, *per se,* courts of record.[46]

Bouvier quoting from the opinion of Chief Justice Shaw,[47] defines a court of record to be

> "An organized judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the courts of common law."

But, inasmuch as the Supreme Court of Indiana has already held justice courts to be courts of record, we are required to construe the statutes in accord with and in the light of previous decisions of the Supreme Court construing and applying words and phrases. It is presumed that the legislature, at the time of the enactment of statutes, takes into consideration such previous construction and the definition given to technical terms, both by previous statutes and by the courts of last resort.[48]

Therefore, we must conclude that under the statute as now written, although not likely so intended, a justice court, and in fact *every* court in the State of Indiana, has power to act under the statute in question.

Having ascertained the power of justice courts to take jurisdiction under this statute another perplexing problem arises;

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[45] *Hooker v. State ex rel. Hays,* 7 Blkf. 272; *Pressler v. Turner,* 57 Ind. 56; *Larr v. State,* 45 Ind. 364; *Fitch v. Vyall,* 149 Ind. 554; *Brackney v. State,* 182 Ind. 343 (344).

[46] *Smith v. Wright,* 11 Mass. 510; *Smith v. Marsden,* 22 Pick. (Mass.) 430; *Commens v. Robinson,* 3 West (N. Y.) 268; *Schneider v. Wise,* 10 Penn. 158.

[47] *Ex Parte Gladhill,* 8 Met. (Mass.) 171.

[48] *McJunkins v. State,* 10 Ind. 140; *Loeb v. Mathis,* 37 Ind. 306; *Reliance Mfg. Co. v. Langley,* 41 Ind. App. 175.

how their jurisdiction, with reference to amount involved may be determined? It is held that ordinarily it must appear from the face of the complaint or petition that the amount involved is within the limit of the justice of the peace to confer jurisdiction. Will that be necessary in actions of declarator? And if the amount is unliquidated, as it usually will be in these cases, can the justice determine the question regardless of the amount actually involved as it may be determined by subsequent events? We think the logical construction would be that it must affirmatively appear by the complaint that the amount of damage to be anticipated falls within the jurisdiction of the justice of the peace. It being essential in all other actions to show affirmatively the jurisdiction by allegations of the complaint, there should be no exception to the rule in this case. The statute provides that the respective courts shall function in respect to this statute "within their respective jurisdictions." But it has been held[49] that if it does not appear upon the record that the justice had *no* jurisdiction the judgment will be valid. The contrary, however, is held in several cases which hold that the jurisdictional amount must *affirmatively* appear on the record. And we presume that in event it appears at the trial or hearing that a greater amount is involved than the jurisdiction of the justice of the peace, he must dismiss the action. However, under the landlord and tenant act, which ought to be susceptible to the same construction, justices of the peace have unlimited jurisdiction as to amount of damages that may be awarded.[51]

These precedents do not solve, but seriously confuse the task of construction with regard to the jurisdiction of the justices of the peace in these cases—in event that it will be construed that they have such jurisdiction. This will furnish a striking instance of the utility of the act itself in providing an uncomplicated means of obtaining a judicial construction of it.

IS THE AUTHORITY TO ASSUME JURISDICTION DISCRETIONARY?

The act does not provide that an action may be brought in any court of record, etc., but grants the courts of record within their

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[49] *Perkins v. Smith*, 4 Blkf. 299.

[50] *Straughn v. Inge*, 5 Ind. 157; *Burgett v. Boghwell*, 56 Ind. 149; *Newman v. Manning*, 89 Ind. 422; *Davenport Mills Co. v. Chamber*, 146 Ind. 156.

[51] Landlord and Tenant forcible entry and detainer. *Scurgeon v. Higgens*, 22 Ind. 107; *Scott v. Willard*, 122 Ind. 1; *Miller v. Citizens Bldg & Loan Assn.*, 50 Ind. App. 132.

jurisdiction "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." Is it mandatory on courts to exercise this power when facts are stated in the petition that bring the movant within the act as one entitled to relief, or is the court vested with unlimited discretion to decline to exercise jurisdiction? Is the discretion *absolute and positive,* or *limited* and *relative?* Can a court at all events refuse jurisdiction where merely a declaratory judgment is asked, or must it assume such jurisdiction? On referring to Section 6 of the Act which is as follows:

"The court may refuse to enter or render a declaratory judgment or decree where such judgment or decree, if rendered or entered would not terminate the uncertainty or controversy which give rise to the proceedings,"

we believe there is no authority given the court to *arbitrarily* decline to assume jurisdiction or refuse to exercise the power conferred, except the circumstances show the case to fall within Section 6.

Consonant with the construction placed upon the statute of Tennessee, it would seem that no justifiable cause or question is presented unless there be an actual controversy. The assertion of a right on the one hand, and a denial of it on the other.

It is provided that

"No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for."

This provision merely has the effect of rendering unavailable —by demurrer or motion in arrest—the objection that the complaint shows no damages accrued or threatened to plaintiff, which could be made in the absence of the statute, and, so far as we can observe, neither adds to nor detracts from the statute which would be as effective without the provisions, because it specifically recognizes a remedy heretofore unobtainable: to secure a determination of rights, status, and other legal relations,

"Whether or not further relief is or could be acclaimed."

"The declaration may be either affirmative or negative in form and effect."

We construe this provision to mean that the judgment or decree may hold that a statute, right or other legal relation *does* exist or *does not* exist; in other words, where, ordinarily, on a question to determine the paternity of a child, an action is brought in partition by the putative heir against other heirs, and

on a finding that the plaintiff is not a child, the judgment is that he take nothing by his complaint, leaving unadjudicated the question of paternity; the statute purposes to set at rest the matter of relationship by permitting a negative declaration that plaintiff is not the child of B. The determination becomes *res adjudicata.*

"AND SUCH DECLARATION SHALL HAVE THE FORCE AND EFFECT OF A FINAL JUDGMENT OR DECREE."

That is to say, as between the parties to the proceeding and their privies, in the absence of an appeal, it constitutes an adjudication upon the subject matter presented. This provision anticipates any contention that the declaration was not as to any matter in issue and litigated—that it is advisory in character merely.

(To be continued)